SINGAPORE REPORTS

Hong Leong Holdings Ltd v Sunbird (Pte) Ltd

COURT OF APPEAL (SINGAPORE) — CIVIL APPEAL NO 110 OF 1988
WEE CHONG JIN CJ, SINNATHURAY J AND CHAO HICK TIN JC
31 JULY 1990

Civil Procedure — Injunction — Damages on cross-undertaking — Whether injunction irregularly obtained — Material non-disclosure justifying discharge of injunction — Conduct of parties

Tort — Malicious falsehood — Relevancy of motive

This is an appeal by the appellants against a decision of the High Court where the appellants were ordered to pay damages totalling $2,590,729 plus costs, to the respondents on two distinct bases. The first was pursuant to a cross-undertaking given by the appellants to the court on the grant on 9 December 1981 of an interim injunction and the second was for losses suffered by the respondents pursuant to certain alleged malicious falsehood uttered by the appellants in two letters to the Ministry of National Development.

This action was instituted by the appellants to restrain the respondents from encroaching on the appellants' land. An interim injunction, obtained by the appellants against the respondents, was partially discharged subject to a condition. Following that, the appellants wrote two letters to the Ministry of National Development which formed the subject of the counterclaim of the respondents.

The main grounds advanced by the appellants to challenge the High Court's decision to award damages against the appellants on the cross-undertaking was that the learned trial judge has failed to correctly appreciate the facts. Highly relevant facts have been overlooked or glossed over. He has also failed to give adequate consideration to the reasons set out in the affidavits filed in support of the interim application. As regards the counterclaim based on malicious falsehood, the appellants contended that nothing in the two letters were false; far less was there any malice. The trial judge has read the letters in a manner which is not warranted.

Both the appellants and respondents were housing developers and owners of three adjoining pieces of land — lots 104-1, 103-5 pt and 103-6. The respondents owned lot 104-1 and had planned to develop the land into a condominium. Prior to the appellants acquiring lot 103-6, the respondents had executed a deed with the previous owner, under which the right of way over lot 103-6 was enlarged. When the appellants became owners of 103-5 pt, the respondents required a right of way over a portion of lot 103-5 pt as well. The respondents approached the appellants with a view to acquiring a right of way as required. The appellants, after several correspondences between parties, refused. The respondents threatened legal proceedings unless the appellants allowed the respondents to construct the road over lot 103-5 pt. The respondents then approached the Roads Branch of the PWD to revise plans which would allow them to build the access road entirely within lot 103-6. This necessitated the building of a retaining wall between the lots of which the respondents subsequently commenced works. The appellants filed the present suit and applied to court ex parte for and obtained an interim injunction restraining the respondents from carrying out and continuing the road construction works which encroached or trespassed upon lots 103-6 and 103-5 pt. The respondents applied to discharge or suspend the interim injunction. The court discharged the injunction in so far as lot 103-6 was concerned subject to the respondents undertaking to build a retaining wall. The injunction over lot 103-5 pt was unaffected. The appellants applied further for an order that the respondents furnish them with detailed plans of the retaining wall which the respondents were constructing. The court made an order requiring the parties to execute a supplemental deed to permit the appellants, if it were necessary, to demolish or alter the retaining wall constructed by the respondents provided that the appellants should ensure that the respondents would have use and enjoyment of the right of way. On 3 March 1982, the appellants wrote a letter to the Minister of National Development which formed the subject of the counterclaim of the respondents for damages for malicious falsehood. As a result of this complaint, the respondents were ordered by the DBCD to stop works and requested to explain why the respondents had signed the access road plans as owner. The respondents requested that the appellants withdraw the complaint. On 28 April 1982 the appellants wrote to the Permanent Secretary of the Ministry of National Development, which was the second letter upon which the respondents' counterclaim on malicious falsehood was based.

Held, allowing the appeal:

(1) The trial judge seems to have relied solely on the evidence in court of one of the appellants' witnesses, Chow, who said that he instructed the application of an interim injunction because he was informed that the embankment had collapsed, a reason that did not exist. But the important consideration for this court in determining whether the injunction was properly obtained must be the grounds put forward to the court in the affidavits themselves and not what a witness thought some five years later. Both the affidavits filed in support of the application for an interim injunction did not refer to a collapse of the embankment. This mistaken belief of Chow should not have been held to convert an otherwise proper application into an improper application.

(2) The non-disclosure of the letter of the respondents' solicitors of 8 December 1981, while relevant to the matter in issue, was not so severe that, even if it were disclosed, the judge hearing the application would not have granted the order altogether.

(3) The argument that the respondents were entitled, as a matter of necessity, to a temporary right of access to the adjacent land for constructing the retaining wall, overlooked the fact that the wall could have been built without having to intrude beyond the 11-metre limit.

(4) It is vitally important to view the situation in its proper perspective. The respondents had excavated beyond the 11m right of way on the appellants' land without the appellants' permission. They had also intruded into lot 103-5 pt. There was no knowledge on the appellants' part as to how far that intrusion would go. Faced with that situation of a massive invasion it is clear that the land owners were entitled to come to court to ask the court to give them the necessary protection.

(5) In determining whether damages on the cross-undertaking should be awarded against the appellants, it is also pertinent to look at the conduct of the parties subsequent to the grant of the interim injunction. The respondents had sought to set aside the interim injunction, not on grounds of material non-disclosure, but on a technical ground.

(6) The trial judge had failed to correctly appreciate the evidence before him and considering the circumstances as a whole, no damages should be awarded against the appellants on their cross-undertaking.

(7) Whatever the motives of the appellants might be, it is clear that there is no false statement in their letter of 3 March 1982. To succeed in an action based on malicious falsehood it must be shown that the defendants utter falsehood; motive alone will not do.

(8) It is crucial that the two letters should be viewed in their correct context. In this case, a land owner was writing to the minister setting out certain facts (which are correct) relating to an adjacent development and asking the minister to look into it to see if the approval had been erroneously granted. How the ministry and the relevant department would react to that was for them to decide. The ministry and DBCD were in possession of all the relevant plans and how the relevant plans and how the retaining wall was to be constructed. A slight error in the letter of 28 April 1982 can hardly be sufficient to form the basis of an action based on malicious falsehood.

Case referred to

1 *R* v *Kensington Income Tax Commissioners* [1917] 1 KB 486 (refd)

Appeal from: Suit No 4695 of 1981 (High Court, Singapore)

Arthur Leolin Price QC (*George Pereira* with him) for the appellants.

Nicholas Patten QC (*Melisa Chong* with him) for the respondents.

Cur Adv Vult

Chao Hick Tin JC (delivering the judgment of the court): This is an appeal by the appellants against a decision of the High Court where the appellants were ordered to pay damages totalling $2,590,729 plus costs, to the respondents on two distinct bases. The first was pursuant to a cross-undertaking given by the appellants to the court on the grant on 9 December 1981 of an interim injunction and the second was for losses suffered by the respondents pursuant to certain alleged malicious falsehood uttered by the appellants in two letters to the Ministry of National Development.

This action was instituted by the appellants to restrain the respondents from encroaching on the appellants' land. An interim injunction obtained by the appellants against the respondents, was partially discharged subject to a condition. Following that the appellants wrote two letters to the Ministry of National Development which formed the subject of the counterclaim of the respondents.

The main grounds advanced by the appellants to challenge the High Court's decision to award damages against the appellants on the cross-undertaking was that the learned trial judge has failed to correctly appreciate the facts. Highly relevant facts have been overlooked or glossed over. He has also failed to give adequate consideration to the reasons set out in the affidavits filed in support of the interim application. As regards the counterclaim based on malicious falsehood, the appellants contended that nothing in the two letters were false; far less was there any malice. The trial judge has read the letters in a manner which is not warranted.

Accordingly, this appeal turns on a proper consideration of the facts. Therefore, it is essential that we should first set out the pertinent facts. This we now do.

Background to the case

Both the appellants and the respondents were housing developers. They were at the relevant time the owners of three adjoining pieces of land — lot 104-1, lot 103-6 and lot 103-5 pt (which was subsequently renumbered lot 634), all of town subdivision XXVIII. These lands were situated along Newton Road. Lot 104-1 was landlocked and had no direct access to Newton Road except by way of a right of way of 5 1/2m wide through lot 103-6. The relative positions of the three lots are shown in exhs D12A and 12B.

The respondents became the owners of lot 104-1 in 1975. In 1977, the respondents embarked on a project to develop the land into a condominium. Plans were submitted to the Development Control Division of the Public Works Department of the Ministry of National Development. Soon thereafter the respondents commenced construction works on the land.

The appellants bought lot 103-6 from the previous owner, Tan Kiem Tie Pte Ltd ('TKT') in December 1979. Prior to this date the respondents negotiated with TKT to enlarge the width of the right of way over lot 103-6. This resulted in the execution of a deed between TKT and the respondents dated 10 November 1979, under which the right of way over lot 103-6 was enlarged from 5 1/2 m to 11m from point A to point B as shown in exhs D12A and 12B. Point A was the beginning point of the right of way and point B was the point at which it was thought that this access roadway would meet the proposed widened Newton Road, as will be elaborated in the next paragraph. The respondents also convenanted to construct the extended roadway at their own expense.

Lot 103-5 abuts on Newton Road. In 1976, it was acquired by the government for the widening of Newton Road. It appears that subsequently the government changed its mind as to the extent of lot 103-5 which it would require for road widening. As a result, lot 103-5 was sub-divided into two separate lots, known as lot 634 and lot 635. Only lot 635 was required for road-widening. For convenience, lot 634 will hereinafter continue to be referred to by its previous number, lot 103-5 pt.

Also in December 1979, the appellants approached the Land Office offering to purchase from the government lot 103-5 pt (which government no longer required for road-widening) so that they could amalgamate it with lot

103-6 for a comprehensive development project. In August 1980, the Land Office replied indicating its in-principle approval of the alienation of the lot to the appellants. The title to the lot was eventually transferred to the appellants on 25 April 1981.

In the meantime the respondents proceeded with their development quite unaware that the government had decided not to widen Newton Road to the full extent of lot 103-5. It was only in September 1980 that the respondents learned through their consulting engineers, Messrs Houkehua Consulting Engineers, that part of the previous lot 103-5 (now lot 634) had been acquired by the appellants from the government. This turn of events had a direct impact on the respondents. This would mean that the 11-metre access roadway proposed for lot 104-1 had to be extended beyond point B for it to meet Newton Road. To do that the respondents would require a right of way over a portion of lot 103-5 pt in order to enable them to construct the 11-metre roadway all the way out to the revised Newton roadline.

Consequently, the respondents approached the Land Office on 13 September 1980 offering to purchase that portion of lot 103-5 which would enable them to so construct the 11-metre roadway right up to the revised roadline of Newton Road. On 27 November 1980, the Land Office informed the respondents that lot 103-5 pt had already been alienated to the appellants. It suggested to the respondents to negotiate with the appellants to secure the access the former required. Following that, the respondents wrote to the Building Control Division. At about the same time on 9 December 1980, the respondents also wrote to the appellants with a view to acquiring a right of way over that portion of lot 103-5 pt in order to construct the 11-metre roadway. On 22 December 1980, the appellants gave an interim reply to the respondents saying that the matter had been referred to their architects and they would revert to the respondents in due course.

According to the evidence at the hearing and which was accepted by the trial judge, soon after the receipt of the letter of 22 December 1980, Mr Wong Kim Chan ('Wong'), the respondents' director and general manager, spoke to one Mr John Lai ('Lai') of the appellants over the telephone and the latter informed the former that the appellants were considering the respondents' proposal to purchase the required portion of lot 103-5 pt. Wong was also informed that the appellants were required to build a similar roadway for the appellants' proposed development on lot 103-6 and lot 103-5 pt. Lai asked Wong to send him the respondents' survey plan. This was complied with in February 1981. Subsequently there was another telephone conversation between Wong and Lai where Wong was asked to send to the appellants the respondents' proposed access road plans. Accordingly, on 9 April 1981 nine sets of the respondents' access road plans (exhs D7A and 7B) were sent to the appellants for their signature as owners of lots 103-6 and 103-5 pt. These plans depicted an 11-metre wide access road from lot 104-1 passing through lots 103-6 and 103-5 pt; there was no provision for any retaining wall. However, in view of the difference in ground levels, the plans showed that the land on lots 103-6 and 103-5 would be cut and sloped in order to stabilize the embankment.

Two weeks later Wong called Lai and was informed that the plans were being considered by the appellants' directors. Wong was requested to call back a few days later. In May 1981, Wong called Lai again and was advised that the appellants would not sign the plans and neither would they sell that portion of lot 103-5 pt in order to enable the respondents to construct the 11-metre roadway out to the revised roadline of Newton Road. Then Lai offered to buy the respondents' development at cost since the respondents could not comply with the requirements of the authorities to construct the access roadway.

This intimation from Lai to Wong caused a sense of desperation on the part of the respondents as this would effectively mean that their development would be stuck and they would be at the mercy of the appellants. The respondents consulted their then solicitor, Mr David Gerald. In late May 1981, David Gerald, writing on behalf of the respondents (undated but received by the appellants on 26 May 1981), asked the appellants to return the nine sets of plans duly completed. He further stated:

> Our clients are looking forward to your kind cooperation and would like to avoid resorting to legal redress. However, if we do not hear from you within seven days from the date hereof, our clients will be left with no other alternative but to resort to legal proceedings to enforce their rights.

On 28 May 1981, David Gerald wrote to the Development Control Division enquiring whether planning approval had been given to the appellants to develop lot 103-6 and 103-5 pt and if so whether it had been given subject to the condition that 'the written permission (was) granted without prejudice to any existing right of way.' On 13 June 1981, the Development Control Division replied to say that an in-principle planning approval was granted to the appellants to develop lots 103-6 and 103-5 pt and the division reiterated that the written permission would be granted 'without prejudice to any existing right of way.'

On 29 May 1981, M/s Foo & Quek, writing as solicitors for the appellants, made the following two points:

> In our view nothing in the deed (between the respondents and TKT) makes it obligatory on our clients as successors in title of the property known as lot 103-6 ... to sign the plans your clients have submitted and in any event, it is beyond question that the deed has nothing to do with lot 103-5.

On the next day the nine sets of plans were returned by the appellants to the respondents unsigned. In passing we

would observe that the points made by M/s Foo and Quek were correct as nothing in the deed gave the respondents any right of access over lot 103-5.

On 2 June 1981, the respondents' solicitor, Mr David Gerald, approached the Commissioner of Lands asking him to intervene in the matter. He requested the Commissioner of Lands, that if the title to lot 103-5 pt had not yet been issued to the appellants, to 'impose a condition in the alienation allowing [the respondents] the right of way and the right to construct the road over lot 103-5 ...'. The letter further made the point that because the alienation of lot 103-5 pt was made without regard to the position of the respondents, this put the respondents 'at the mercy of Hong Leong Holdings because so long as Hong Leong Holdings does not develop lot 103-5 [the respondents] will not be able to complete the necessary access road through lot 103-5 to lot 104-1. The delay will cause enormous expenditure ...'.

On 8 June 1981, David Gerald wrote to M/s Foo & Quek raising two points none of which was valid. He also stated that he had referred the matter to the Commissioner of Lands for the latter's necessary action but added he believed 'that this matter could still be amicably resolved by us.'

Then on 19 June 1981, M/s Foo & Quek replied to say that the appellants would be 'happy to resolve this matter amicably with your clients. Perhaps you would let us know what proposal your clients have in mind.' This invitation brought about a response from David Gerald dated 3 July 1981 which was hardly in consonant with the spirit of the occasion. The relevant part of the letter reads:

> ... we are awaiting instructions from our clients who we believe are in the process of computing the special damages suffered by them as a result of your clients' refusal to grant our clients the right of way.

The respondents were clearly asking for a favour and yet they, through their solicitor, had the audacity to make a threat of that kind.

On 10 July 1981, David Gerald forwarded to M/s Foo and Quek nine sets of plans for the appellants' signature and in that letter, David Gerald also said:

> We have forwarded the nine sets of plans on the basis that our clients will not be prejudiced for their claims for damages as a result of your clients' early refusal to sign these plans. We shall revert to you on the full extent of our clients' claim at a later date.

These plans were the same as those returned by the appellants to the respondents in late May 1981.

On 22 July 1981 M/s Foo & Quek, inter alia, questioned David Gerald's assertion that the appellants were obliged to endorse on the respondents' plans without any qualification. They said it was 'not possible at this stage to endorse [the respondents'] plans willy-nilly without reference to their own plans. It is surely unimaginative at this stage to demand that your clients' plan be endorsed without qualifications and to threaten legal proceedings if our clients did not comply with such demand without first establishing your clients' right of demand.' M/s Foo & Quek returned the plans with the remark that 'the said plans *as presently drawn* cannot and will not be endorsed by our clients.' (Emphasis added.)

On 23 July 1981 a meeting was convened by one Mr S Narayanaswamy of the Land Office and attended by the solicitors of the parties. On the next day, M/s Foo & Quek wrote to David Gerald stating that the appellants were agreeable to have a meeting with the respondents on the condition that the respondents withdrew their threat to commence legal proceedings against the appellants. The solicitors emphasized:

> This condition is made necessary by the tenor of your letters of 3 and 7 July 1981 and we are instructed to emphasize that whereas our clients have no intention of being obstructive, they do not intend to be intimidated.

This offer by the appellants to meet was very much in line with the general understanding reached at the conciliatory meeting held at the Land Office. This was what Mr Narayanaswamy wrote in his letter of 6 August 1981 addressed to M/s Foo & Quek and copied to David Gerald:

> As I explained at our meeting on 23 July 1981, I called the parties together in the context of M/s David Gerald's application for a right of way over your clients' land from lot 104-1 to Newton Road. At our meeting, we noted, inter alia, that a right of way over lot 103-6 gives access to Newton Road, already exists in favour of lot 104-1 and is not disputed by your clients. Your clients are willing to discuss with M/s Sunbird Pte Ltd the question of your clients' endorsement of their plans, which plans involve construction of access road not only over part of lot 103-6 but also over part of lot 103-5 recently alienated to your clients ...
>
> In the circumstances, I have left it to the parties concerned to come to an amicable settlement over the matter without the intervention of the Land Office ...

This offer by the appellants to meet brought no further response from the respondents. Instead, on 6 August 1981, the respondents approached an officer (one Mr Kwan Tai Hua) of the Road Branch of the PWD and related to the officer the problems they encountered in getting the access road plans being endorsed by the appellants. It would appear that at that meeting the Road Branch was prepared to consider a revision of the plans, subject to certain undertakings being given by the respondents. The revised plans (exhs D12A and 12B) would require the respondents to build the access road from point A to point B, to a width of 11m. From point B up to Newton Road, the access road would be narrowed down to

5 1/2m, falling entirely within the original right of way of 5 1/2m over lot 103-6, so that the respondents would not have to encroach onto lot 103-5 pt.

In their letter of 7 August 1981, the respondents gave the following undertakings to the Roads Division:

(i) the respondents would widen that portion of the access road from 5 1/2m to 11m in the event that they acquired a right of way over lot 103-5 or such a right was available to the respondents to construct the 11-metre access road;
(ii) that the respondents would be responsible for the maintenance at all times of the whole of the access road from Newton Road to lot 104-1 on completion.

On 18 November 1981, the Road Branch of the PWD granted approval to the respondents with regard to the revised access road plans — exhs D12A and 12B. Under those plans, a retaining wall would be constructed running from point A to point B. This was made necessary because of the difference in the levels of the proposed access road and the ground of lots 103-6 and 103-5 pt.

At this juncture, we should mention that there was a building on lot 103-6, known as No 11 Newton Road and which was occupied by a tenant, one Ng Foon Koo ('Ng'). By a written consent dated 5 November 1981, Ng confirmed that he had no objection to the respondents constructing the access road and cutting down trees on lot 103-6 for that purpose. On 2 June 1981, the appellants commenced an action in the district court to regain possession of the premises from Ng. As of 5 November 1981, that action was still pending.

Sometime in mid-November 1981, the contractors of the respondents commenced construction of the access road. On 4 December 1981, M/s Foo & Quek wrote to the respondents in these terms:

> We are the solicitors for M/s Hong Leong Holdings Ltd and have been instructed that you have carried out road construction on our clients' land (lot 103-6 TSXXVIII) to such extent that such road construction encroaches on our clients' property as well as affects the land profile of our clients' property causing instability to the embankment. We are instructed that though you have a right of way on our clients' property you do not have a right to construct the road in the manner aforesaid. We are instructed to and do hereby give you notice to forthwith cease the road construction otherwise we shall institute legal proceedings against you, your servants and agents without further notice.

A letter to a similar effect and dated 4 December 1981 was also sent by M/s Foo & Quek to the respondents' contractors.

On 7 December 1981, M/s Foo & Quek wrote to the Development Control Division complaining that the respondents' road construction had encroached onto lot 103-5 pt. From this letter it is clear that the appellants were unaware of the revised access road plan — exhs D12A and 12B. They were under the impression that what had been approved were the road plans which they had refused to sign and returned to the respondents. This letter stated:

> ... It appears clear to us that Sunbird's building plans should not have been approved since their plans include a roadway which encroaches onto lot 103-5 ... (now belonging to our clients) and which plans of Sunbird were never endorsed by our clients ...
>
> Having regard to the above, we shall be pleased if you will take immediate steps to stop Sunbird from further proceeding with the construction of the roadway.

On 8 December 1981, M/s Shook Lin & Bok (who had by then taken over the matter from Mr David Gerald) wrote on behalf of the respondents to M/s Foo & Quek in response to the latter's letter of 4 December 1981. This letter reads:

> We are instructed that the road is being constructed in accordance with the requirements of the planning authorities in Singapore. There is no other manner of constructing any road in any development except in accordance with such requirements.
>
> We are also instructed that the road construction has not encroached on your clients' property. Our clients would go further and say that they have an implied right to have temporary access to your clients' land in order to do the framework for construction of and *to construct the retaining* wall so long as the retaining wall, when completed, will not encroach on your clients' land. The retaining wall is for your clients' benefit as much as ours in that it will give the necessary support to your clients' property. This implied right is derived from your clients' obligation to allow our clients to construct the road as undertaken by them in a deed dated 10 November 1979.
>
> Finally, we would add that the new road will certainly enhance the value of your clients' land and that your clients' attitude in this matter is absolutely unreasonable. (Emphasis added.)

For the first time the appellants were informed of the construction of a retaining wall. It would be recalled that in accordance with the original access road plans (exhs D7A and B) which the appellants had returned to the respondents, there was no provision for a retaining wall. In those plans what was provided for was that the embankment beyond the 11-metre right of way would be cut and sloped. This letter did not expressly inform the appellants that the respondents had modified the original plans and had submitted revised plans (exhs D12A and D12B) to the authorities, which were eventually approved.

On the same day M/s Foo & Quek replied to M/s Shook Lin & Bok to say that 'our clients do not agree that your clients have an implied right to have temporary access to our clients' land as stated in para 3 of your letter. In any event, we have commenced an action in Suit No

4695 of 1981 and have arranged for the writ to be served directly on your clients.'

However, on the day before, 7 December 1981, the appellants filed the present suit, No 4695 of 1981, in the High Court. On 9 December 1981, the appellants applied to court ex parte for and obtained an interim injunction restraining the respondents from carrying out and continuing the road construction work which encroached or trespassed upon lots 103-6 and 103-5 pt. Two affidavits were filed by the appellants in support of their application. The affidavits were sworn by Lai and one Mr Freddie Ong, a surveyor, on 7 December 1981. The pertinent portions of Lai's affidavit were the following:

> 4 ... On or about 3 or 4 December I was informed by Mr Freddie Chong that the defendants through their servants or agents had in the course of excavation works in connection with the construction of the said roadway cut into the plaintiffs' lot 103-6 going beyond 11-metre wide and had also further trespassed onto lot 103-5.
>
> 5 I believe that the defendants are developing lot 104-1 and their building plans in connection with the same development have been approved. I know, however, that the defendants' plans were not endorsed by the plaintiffs and though they might have been endorsed by the former owners ... the defendants are not entitled to excavate and or construct a roadway beyond 11 metres wide as they have done nor do the defendants have the right to excavate or construct the roadway so as to encroach and trespass onto lot 103-5 which never belonged to the former owners of lot 103-6.
>
> 8 Annexed hereto ... are two letters written by the plaintiffs' solicitors to the defendants and their contractors requesting them to immediately cease further carrying on the construction of the roadway.
>
> 9 For the reasons abovementioned I am advised and verily believed that the defendants are not entitled to construct the said roadway in the manner described ... I believe that if the defendants are not urgently restrained as prayed they would proceed further with the said construction of the roadway which will cause the plaintiffs irreparable damage in that the plaintiffs' own development of lot 103-6 would be severely affected.

In his affidavit Freddie Chong confirmed that he carried out a survey on site and stated that 'the excavation of earth in connection with the construction of the roadway extends beyond 11-metres wide on lot 103-6 ... and extends and encroaches upon lot 103-5.'

On 14 January 1982, the respondents applied to discharge or suspend the interim injunction on the ground that though the appellants were the owners of lot 103-6, they were never and were not at the relevant time in possession thereof. The respondents stated in their affidavit affirmed by Wong that as the appellants were not in possession, they could not maintain an action for trespass against the respondents.

By an affidavit affirmed by Lai on 19 January 1982, the appellants contended that so long as the 'trespass has caused a permanent injury to the land' the owner, though not in possession, could commence an action at once. Lai also stated that the appellants had been advised by their consulting engineers, M/s Tan Ee Peng & Partners, that the excavation works carried out by the respondents had created a 'steep and exposed high embankment which is not structurally stable and if action is not taken to protect, prop and stabilize the said embankment, slippage and collapse of the embankment may occur which would endanger the movement of people and vehicles along the roadway.'

By an affidavit filed on 21 January 1982 for the respondents, Wong said that the exposed embankment was only temporary as a retaining wall would be built as required by the competent authority. The respondents denied that what they had done by way of excavation had caused permanent injury to lot 103-6.

On the respondents' motion to discharge the interim injunction coming up before the Chief Justice on 22 January 1982, the injunction was discharged in so far as lot 103-6 was concerned subject to the respondents' undertaking to build a retaining wall. The injunction over lot 103-5 pt was affected. The parties were also given liberty to apply.

Pursuant to this liberty to apply provision, the appellants applied to court praying that the court would direct the respondents to furnish the appellants with the detailed plans of the retaining wall which the respondents were constructing. This arose because the appellants were concerned that the construction of the retaining wall might interfere with the appellants' plans to develop lot 103-6. A written request made earlier, on 28 January 1982, by the appellants' solicitors, M/s Foo & Quek, to the respondents' solicitors, M/s Shook Lin & Bok, for the respondents' plans did not bring about any result until 27 February 1982. In the meantime, on 25 February 1982, the appellants wrote to the Registrar, Supreme Court, requesting that the matter be restored before the Chief Justice.

This application was scheduled to be heard on 1 March 1982. But by mutual consent it was adjourned to 5 March 1982 for their technical advisers to meet. The Chief Justice orally indicated that in the meantime the respondents should suspend all works on the construction of the retaining wall. The application was further adjourned to 12 March 1982 on which day the Chief Justice made an order requiring the parties to execute a supplemental deed in terms of the draft annexed thereto. The effect of this supplemental deed was to permit the appellants, if it were necessary in the course of developing lot 103-6, to demolish or alter the retaining wall constructed by the respondents provided that the appellants should ensure that the respondents would have the use and enjoyment of the

right of way from point A to point B. The supplemental deed was eventually executed between the parties on 29 April 1982 after some hitches regarding the scope of the order of 12 March 1982 had been resolved.

In so far as the court proceedings were concerned, there the matter rested. But on 3 March 1982 the appellants wrote a letter to the Minister of National Development, which formed the subject of the counterclaim of the respondents for damages for malicious falsehood. It is necessary to set out the contents of this letter in full:

> We crave leave to write to you, Honourable Minister, on the carrying on of certain construction works on our abovementioned property by the adjacent landowner without our company's consent.
>
> Our company is the owner of the land known as lots 103-5 and 103-6 TS XXVIII at Newton Road. We advise that in-principle approval was granted to us in June 1980 for the abovementioned proposed condominium development (ref DC 25/80/C) and we enclose herewith a copy of the site proposal plan for your kind reference.
>
> The owners of the adjoining lot 104-1 TS XXVIII are carrying on a housing development on their land and they have been granted a right of way over lot 103-6 from the point A (on the common boundary of lots 104-1 and 103-6) to a point B as shown in the enclosed plan. The right of way in fact runs along a road reserve and the effect of the right of way is to widen that road reserve from a narrow track to a width of 11m. We would assume that the owners of lot 104-1 were able to obtain approval for their proposed housing development by virtue of the abovementioned right of way granted to them. However, notwithstanding such right of way, we maintain that the owners of lot 104-1 should not be entitled to carry on any construction work on our property, without first obtaining our company's consent.
>
> Our company has discovered that the owners of lot 104-1 are presently carrying on construction works of a retaining wall on our property along the road reserve described above. We would like to point out that such construction works on our land are being carried on without our company's consent and further without consideration for our approved condominium development. With reference to the enclosed proposal plan, it can be seen that the construction of the retaining wall (denoted in pink) if allowed to remain would impose an obstruction to our architect's proposal which has been approved.
>
> We wish to admit that we acknowledge and do not deny the abovementioned right of way granted to the owners of lot 104-1 over our land, but we strongly feel that any construction works on our land should not be permitted without our company's consent.
>
> Under the above circumstances, we are made to believe that the owners of lot 104-1 may be carrying out construction works without obtaining the necessary or proper approval from the relevant authorities or where such approval.
>
> Sir, we seek your kind attention in the above matter.

As a result of this letter of complaint, the Development and Building Control Division ('DBCD') of the PWD orally instructed the architects of the respondents to cease all works on the access road. On 13 March 1982, that division wrote to the respondents' consulting engineers, Houkehua, asking them to explain why the respondents had signed the access road plans as owner. Pending such clarification, Houkehua were required to stop all works. On 18 March 1982, Houkehua wrote to DBCD explaining the problem they encountered (with some inaccuracies) in obtaining the signature of the appellants to their access road plans. They said they had not misled DBCD.

On 23 April 1982, M/s Shook Lin & Bok wrote to M/s Foo & Quek regarding the letter of complaint of 3 March 1982. In view of the orders of court, M/s Shook Lin & Bok requested the appellants, through their solicitors, to withdraw the complaint. On 28 April 1982, M/s Foo & Quek informed M/s Shook Lin & Bok that the appellants would be writing to the Ministry of National Development informing them, inter alia, of the order made by the Chief Justice on 12 March 1982 as well as enclosing a copy of the order.

Accordingly, on that very same day the appellants wrote to the Permanent Secretary of the Ministry of National Development, which was the second letter upon which the respondents' counterclaim on malicious falsehood was based. We will again set out the entire letter even though the objectionable part was only in the last paragraph.

> With reference to my letter of 3 March 1982 addressed to the Honourable Minister for National Development, I feel compelled to state the following:
>
> (a) When the owners of lot 104-1 began constructing the 11m roadway and the retaining wall, we instructed our solicitors to apply for an ex parte injunction which they got in respect of lot 103-6 and lot 103-5 pt (now known as lot 634) but on hearing of a motion on the application of the owners of lot 104-1, the injunction in respect of lot 103-6 only was discharged with liberty to the parties to apply to the court. A copy of the court order dated 22 January 1982 is enclosed. The injunction in respect of lot 103-5 pt continues.
>
> (b) Subsequently, our solicitors applied under the liberty to apply provision of the order above referred to and the parties appeared before the Chief Justice. Affidavits were filed by both parties and copies of which will be supplied if necessary.
>
> (c) Eventually, the order of court dated 12 March 1982 was made by the Chief Justice, an approved draft copy of which order is enclosed. The sealed copy is not at present available.
>
> (d) Enclosed also is a copy of our solicitors' letter dated 9 March 1982, and addressed to the solicitors for the owners of lot 104-1.
>
> Notwithstanding the above, I nevertheless think that in constructing the 11m roadway referred to in my letter of 3 March 1982, which roadway stretches from lot 103-6 to lot 103-5 pt, the owners of lot 104-1 may have an implied consent over lot 103-6, but they do not however have our consent whatsoever to construct the 11m roadway along lot 103-5 pt.

As soon as Houkehua received a copy of the order of court of 12 March 1982 and the supplemental deed, they forwarded the same to the DBCD and requested for permission to recommence work on the access road. Following that request, DBCD wrote to the appellants on 17 May 1982 asking 'in view of the settlement, we wish to enquire if you have further objection to the construction work pertaining to the access road on lot 103-6.' On 26 May 1982, DBCD pressed the appellants for an early reply. On 1 June 1982, the appellants replied to DBCD enclosing a copy of their letter of 28 April 1982 addressed to the Ministry of National Development and drew DBCD's particular attention to the last paragraph of that letter.

On 11 June 1982, the respondents wrote to DBCD urging the latter to permit the respondents to recommence work. By a letter of 17 June 1982, DBCD advised the respondents, through their consulting engineers, Houkehua, to 'get consent from the owner of lot 103-5 for the recommencement of the work pertaining to the access road.'

On 7 July 1982 Wong and Mr William Seet of the respondents met with officials of DBCD and proposed that the construction of the access road be divided into two stages. Stage I was from point A to point B and Stage II was from point B to Newton Road. The respondents asked for permission to proceed with stage I and undertook not to construct stage II until clearance was subsequently given.

Then on 19 August 1982, M/s Shook Lin & Bok wrote to M/s Foo & Quek saying that the respondents had been advised by DBCD to obtain the appellants' signature to the approved plans for the proposed roadworks and forwarded three sets of plans for the appellants' signature. On 1 September 1982, M/s Shook Lin & Bok sent a reminder. The appellants replied on 20 September 1982 and indicated that they would only consent to a retaining wall being erected from point A to point B but not beyond point B to Newton Road. In view of the fact that the appellants were only prepared to give a limited consent, on 21 September 1982 M/s Shook Lin & Bok requested M/s Foo & Quek to return the plans.

In the meantime, on 6 September 1982, DBCD gave permission to the respondents to commence stage I. On 14 September 1982, M/s Shook Lin & Bok wrote to DBCD explaining the position: that the respondents had an extended right of way of 11m from point A to point B and a narrower right of way of 5 1/2m from point B to Newton Road over that strip of lot 103-6 linking to Newton Road. On 11 October 1982, DBCD gave permission to the respondents to commence stage II works provided that the works did not encroach onto adjoining lots. When the action came up for trial, counsel for the appellants told the court that they were no longer seeking the reliefs prayed for in the writ. However, the respondents had given notice that they wished to pursue their claim for an inquiry into the damage suffered by the respondents arising out of the ex parte injunction obtained by the appellants on 9 December 1981 and their counterclaim against the appellants for malicious falsehood.

Damages on the interim injunction

The above are the pertinent facts. We will now turn to examine the issues and the grounds of appeal. The first issue is whether the High Court ought to have ordered an inquiry and awarded damages to the respondents. The trial judge held that, on the evidence in court of Chow, who said that the excavation and cutting into had caused a collapse of the embankment, the appellants obtained the interim injunction for a reason which did not exist, ie the collapse of the embankment. The trial judge said this was raised as an afterthought. He held that the intention of the appellants in obtaining the interim injunction was to frustrate the development of the respondents. In coming to this finding he took into account the events prior to July 1981 and, in particular, the few conversations which took place between Wong and Lai, wherein Lai informed Wong that the appellants would refuse to sign the plans exhs D7A and 7B and that the appellants were prepared to buy over the respondents' project at costs.

It will be recalled that the plans in exhs D7A and 7B show that the access road would be one of 11m wide from point A to Newton Road. In other words, a certain part of that roadway would intrude into lot 103-5 pt which then belonged to the appellants and in respect of which land the respondents had no right of way whatsoever. Those plans had been returned unsigned by the appellants after the respondents' solicitors threatened legal proceedings.

It seems to us that while the trial judge gave ample consideration to the events up to May 1981, he did not give adequate consideration to the subsequent events. The later correspondence between the parties' solicitors show that the respondents' solicitors kept harping on the point that they would sue the appellants for damages for their refusal to sign the plans knowing full well that the respondents had no right of way over lot 103-5 pt. This eventually led to a meeting at the Land Office between the parties' solicitors and Mr Narayanaswamy of that office. As we have stated above in outlining the salient facts, the outcome of that meeting was that the parties would try to resolve the matter amicably. Following that meeting, and without any delay, M/s Foo & Quek wrote to David Gerald requesting the respondents to withdraw their threat of legal proceedings so that discussions could proceed. Such prompt follow-up action at least demonstrated the good faith of the appellants. There was, however, no further communication from the respondents' solicitors to that request. As of that stage, for whatever reasons, it

was the respondents who chose not to accept the offer to discuss and resolve the matter amicably. Yet the trial judge did not give any consideration to this aspect at all. It was glossed over. In our judgment, the trial judge has erred in his appreciation of the facts by placing too much reliance on the events in May 1981 and none at all or very little on the events in July/August 1981.

Indeed, as soon as this was pointed out to counsel for the respondents, he submitted that whatever it was, the events prior to August 1981 were quite immaterial to the question whether or not Hong Leong had properly obtained the interim injunction in question. Mr Patten submitted that there was material non-disclosure on the part of the appellants when on 9 December 1981 they went before the judge-in-chambers on an ex parte application. He said the appellants had failed to refer to the earlier communications between the parties on the question of the access road. He contended that there was material non-disclosure in that the appellants' affidavit filed in support had failed to exhibit to the court the letter of 8 December 1981 written by M/s Shook Lin & Bok, in reply to M/s Foo & Quek's letter of 4 December 1981. He said it would have made a significant difference to the judge hearing the application if those facts were brought to his attention. Mr Patten relied on the often quoted case *R* v *Kensington Income Tax Commissioners*[1] in support of the proposition that any material non-disclosure would lead to the discharge of the interim injunction and the consequential award of damages against that party on its undertaking which it has given to the court.

It seems to us important to examine what was actually stated in the affidavits filed in support of the application for the interim order. Lai, in his affidavit filed on 7 December 1981, first referred to the respective ownership of the three lots in question. He then referred to the deed of 10 November 1979 wherein the previous owner of lot 103-6 granted a right of way to the respondents to construct a roadway of 11m wide from point A to point B. He then went on to say (this part has been quoted in extenso at pp 15-16 above) that on 1 December 1981 after receiving the information that the respondents had begun construction of their access road, he instructed Freddie Chong, a chartered surveyor, to carry out a survey. A few days later, Chong told Lai that the respondents' servants or agents had in connection with the construction of the access road 'cut into the plaintiffs' lot 103-6 going beyond 11m wide and had also further trespassed on to lot 103-5'. His main complaint was that 'the defendants are not entitled to excavate and or construct a roadway beyond 11m wide as they have done nor do the defendants have the right to excavate or construct the roadway so as to encroach and trespass onto lot 103-5'. He then concluded his affidavit by saying that 'by reason of the said excavation works, the defendants have trespassed onto the plaintiffs' lots 103-6 and 103-5 and I believe that if the defendants are not urgently restrained as prayed they would proceed further with the said construction of the roadway which would cause the plaintiffs irreparable damage in that the plaintiffs' own development in lot 103-6 would be severely affected.' Chong in his affidavit confirmed what was stated by Lai that 'the excavation extends beyond 11m wide of lot 103-6 and extends and encroaches on lot 103-5.'

Both the affidavits nowhere refer to the collapse of the embankment. The trial judge seems to have relied solely on the evidence in court of Chow who said that he instructed the application of an interim injunction because he was informed that the embankment had collapsed. That might be what Chow thought. In his evidence Chow said he had never visited the land. But the important consideration for this court in determining whether the injunction was properly obtained must surely be the grounds put forward to the court in the affidavits themselves and not what a witness thought some five years later. It seems to us that this mistaken belief of Chow should not have been held to convert an otherwise proper application into an improper application. All the more so if, as the trial judge has found, this allegation of the collapse of the embankment was an afterthought on Chow's part.

The facts as set out in the affidavits of Lai and Chong were consonant with the fact situation on the ground. It was not disputed that the excavation had intruded well beyond the 11-metre right of way in so far as lot 103-6 was concerned. This was admitted in the letter dated 8 December 1981 of M/s Shook Lin & Bok. It was not denied that there could have been consequential intrusion into lot 103-5. A land owner who has not given permission to another to enter into his land to carry out any works beyond the permitted limit is surely entitled to come to court to restrain that other person from infringing his rights as owner. It must be borne in mind that at the relevant time the appellants were totally in the dark as regards the revised plans (exhs D12A and 12B). The appellants would not have known how the retaining wall was to be constructed and to what extent: the letter from M/s Shook Lin & Bok of 8 December 1981 made no elaboration. But what the appellants saw was a massive invasion into their land, well beyond the 11-metre right of way and also onto lot 103-5. The earlier plans (exhs D7A and 7B) did not envisage the construction of any retaining wall.

Though we think that the letter of 8 December 1981 was certainly relevant to the matter in issue, we do not think that this non-disclosure is so severe that, even if it were disclosed, the judge hearing the application would not have granted the order together. We note that the trial judge did not place any significance on the non-disclosure of this letter at all. We would observe that this letter, other than stating that a retaining wall would be built in accor-

dance with the plans approved by the relevant authorities, did not forward the plans in question. In this letter the respondents had argued that they were entitled, as a matter of necessity, to a temporary right of access to the adjacent land just for the purposes of constructing the retaining wall. This argument was accepted by the trial judge. In our opinion this argument overlooked the fact that even the respondents' own consulting engineer, Dennis Ong (DW9), admitted that the retaining wall could be constructed by another means without having to intrude beyond the 11-metre limit. One method was by the use of steel sheet piles (see evidence of PW1, Mr Tan Ee Peng). Another was by the driving of tantalized piles; in fact this was the method eventually used by the respondents. It was only a question of higher cost and a little more time. That being the case, we fail to see how it could validly be argued that the intrusion was a necessity for the purposes of constructing the wall.

The trial judge also held that the excavation was only temporary and would be back-filled after the retaining wall had been constructed. That may be so. But it was no less a trespass. He then went on to say that there was no evidence that the respondents had caused any permanent injury to lot 103-6. Perhaps the evidence of PW1 had been overlooked. PW1 had said that the plan to build the retaining wall would cause the greatest amount of disturbance to the land because:

> considerable extent of the existing embankment slope would be required to be excavated. Eventually if our proposed development proceeds then those buildings which would be near the embankment slope on which we intend to build without piles would now require piling because the original soil strength and soil properties would have been weakened by the excavation.

Even the engineer of the respondents, Dennis Ong (DW9), could only say the back-fill would reinstate the embankment 'almost full to its original condition.'

In our judgment it is vitally important to view the situation then in its proper perspective. What emerged was that the respondents had excavated beyond the 11-metre right of way on the appellants' land without the appellants' permission. They had also intruded into lot 103-5 pt. There was no knowledge on the appellants' part as to how far that intrusion would go. Faced with that situation of a massive invasion it seems to us clear that the land owners were entitled to come to court to ask the court to give them the necessary protection.

In this regard and in determining whether damages on the cross-undertaking should be awarded against the appellants, we think it is also pertinent to look at the conduct of the parties subsequent to the grant of the interim injunction. First, the respondents did not make an immediate application to have the order set aside. It was only made more than a month later, on 14 January 1982. Second, and more importantly, the reason upon which the respondents sought to have the interim order set aside was not on any ground of material non-disclosure but on the very technical ground that as the land in question was at the time in the occupation of a tenant, the appellants, as residual owners, were not entitled to come to court to ask for the injunction. Even in the second affidavit filed on behalf of the respondents to support the discharge of the interim injunction, nothing on material non-disclosure was raised. And when the application for discharge came before the court on 22 January 1982, the interim order was discharged in so far as it related to lot 103-6 and was on condition that the plaintiff would build a retaining wall.

We appreciate that in awarding damages in favour of the respondents pursuant to the appellants' cross-undertaking the trial judge was exercising his judicial discretion and that an appellate court should only interfere with the exercise of that discretion if it were based on a misunderstanding of the law or the evidence before him. For the reasons which we have given above, we think, with respect, that the trial judge had failed to correctly appreciate the evidence before him. Considering the circumstances as a whole, we do not think that any damages should be awarded against the appellants on their cross-undertaking. Accordingly we would set aside the damages of $701,718 awarded in favour of the respondents.

Malicious falsehood

We turn next to consider the counterclaim of the respondents based on malicious falsehood. As stated hereinbefore, this claim arose because of the two letters written by the appellants on 3 March 1982 and 28 April 1982. These two letters have been set out in extenso earlier.

The trial judge in his judgment (at p 48) said that paras 4 and 6 of the letter of 3 March 1982 conveyed to the minister the following:

> (i) the [appellants] have suddenly discovered that the retaining wall was being built on their property along the road reserve;
> (ii) the retaining wall was being built without the appellants' consent and without consideration for the [appellants] proposed development on lot 103-6 and the retaining wall if allowed to remain would obstruct the [appellants] development;
> (iii) the [respondents] were carrying out construction works without proper approvals from the relevant authorities or had misled the authorities to grant to the [respondents] such approvals.

He held that these statements were untrue and misleading.

We will now examine each of the statements in turn. Mr Price submitted that these statements were not untrue. Taking (i) he said that the letter of 3 March 1982 did not contain the word 'suddenly'. Though on 8 December

1981, the appellants were informed by M/s Shook Lin & Bok's letter of that date that the respondents were constructing a retaining wall, the appellants were not given any further details of the retaining wall until 27 February 1982 when the plans were furnished by M/s Shook Lin & Bok to M/s Foo & Quek. Only on that day were the appellants aware of the kind of retaining wall which the respondents were constructing on lot 103-6. Only then did the appellants truly come to know that the retaining wall was being built along the road reserve. This letter complained of was written four days later. We accept the submission that (i) was not untrue.

As regards the alleged statement in (ii) there are three parts in it. The first is that the retaining wall was being built without the appellants' consent. That is undoubtedly true. While the respondents had a right of way, the appellants had not consented to the construction of the retaining wall as set out in the revised plans — exhs D12A and 12B. The appellants did not have sight of the revised plans until 27 February 1982. The second is that the retaining wall was being constructed without consideration of the appellants' proposed development on lot 103-6. This is again true. There was no consultation with the appellants when the respondents' consultants drew the revised plans. The third is that the retaining wall if allowed to remain would obstruct the appellants' development. This is a natural consequence of what was stated immediately before and is again true. The fact that the appellants even asked for a right to alter or demolish the retaining wall in the event that their development so required, which right was incorporated in the supplemental deed, clearly reinforced what they said.

As regards (iii), we are unable to agree that the second last paragraph of the letter of 3 March 1982 could fairly be construed to mean that which the trial judge had suggested. For convenience we could quote that para again:

> Under the above circumstances, we are made to believe that the owners of lot 104-1 may be carrying out construction works without obtaining the necessary or proper approval from the relevant authorities or where such approval has been granted it may have been granted erroneously.

We think this paragraph clearly sets out a belief of the appellants, ie that the respondents may be carrying out the construction works without obtaining the necessary *or* proper approval; and if approval was in fact given the appellants expressed the belief that it might have been granted erroneously. There was no suggestion in that paragraph that the respondents had misled the authorities in granting the approval and none should be so implied. We note the use of the word 'erroneously'. More importantly, the last paragraph of the letter must not be overlooked as it sought the 'kind attention' of the minister. That was plainly a request to the minister to look into the matter. We do not think anything more could fairly be read into that paragraph.

Whatever the motives of the appellants might be in writing that letter, it seems to us clear that there is no false statement in that letter. It might very well be that the appellants were unhappy that the respondents went behind the back of the appellants in obtaining the approval to the revised plans without so much as letting the appellants know about it. But to succeed in an action based on malicious falsehood it must be shown that the defendant utters falsehood; motive alone will not do.

We come next to the letter of 28 April 1982, where the objectionable part is in the last paragraph. For convenience we will set that paragraph out again:

> Notwithstanding the above, I nevertheless think that in constructing the 11-metre roadway referred to in my letter of 3 March 1982, which roadway stretches from lot 103-6 to lot 103-5 pt, the owners of lot 104-1 may have an implied consent over lot 103-6, but they do not however have our consent whatsoever to construct the 11-metre roadway along lot 103-5 pt.

The trial judge held that this paragraph was misleading and malicious as it would 'suggest to the ministry that the [respondents] were going to build an 11-metre roadway over lot 103-5 without the [appellants'] consent.' Mr Price contended that no such suggestion was made in that letter; it did not say that the respondents intended to construct the 11-metre roadway on lot 103-5 pt. All it stated was that the respondents did not have the appellants' consent to construct an 11-metre roadway on lot 103-5 pt.

In our view, this letter of 28 April 1982 cannot be viewed in isolation and must be read together with the letter of 3 March 1982. While it was wrong for the appellants to have stated in the letter that the 'roadway stretches from lot 103-6 to lot 103-5 pt', a reference which Mr Price conceded was unfortunate, we do not think this error per se was sufficient to found an action based on malicious falsehood. Chow said that their aim was to emphasize to the ministry that the respondents had no right to construct an 11-metre roadway on lot 103-5 pt. He explained during cross-examination in this way:

> According to the advice of Mr Tay Soo Tee, since the court order was made on 12 March 1982 it was possible that the authorities might misunderstand that there was already a full settlement, the authorities might misunderstand that the whole length of the roadway from [respondents'] lot right down to Newton Road would be 11-metre wide road ... it could be better for us to write to the authorities to make clear our position.

The trial judge held that the paragraph was 'misleading and malicious'. But as we have pointed out when dealing with the question of the cross-undertaking on damages, he has not correctly appreciated all the material facts. He has also wrongly construed the first letter of 3 March 1982.

Those errors had obviously influenced his perception of his second letter. In our judgment there was no real evidence to suggest that there was malice. Even the correspondence of the respondents and their consultants contained errors. This occurred in the letter dated 18 March 1982 of the respondents' consulting engineers, Houkehua, para 2 of the respondents' letter of 9 July 1982 to DBCD and para 3 of the respondents' solicitors' letter of 14 September 1982 to DBCD.

In our view it is crucial that the two letters should be viewed in their correct context. Here you have a land owner writing to the minister setting out certain facts (which are correct) relating to an adjacent development and asking the minister to look into it to see if there was an irregularity in the approval granted. How the ministry and the relevant department would react to that was for them to decide. The ministry and DBCD were in possession of all the relevant plans and how the retaining wall was to be constructed. A slight error in the letter of 28 April 1982 can hardly be sufficient to form the basis of an action based on malicious falsehood.

In the result we would allow the appeal of the appellants and set aside the orders of the trial judge. Leave is given to the appellants to withdraw the action. Costs of the hearing on the cross-undertaking on damages and on the counterclaim before the High Court and of this appeal before this court shall be borne by the respondents. There shall also be the usual consequential orders.

Appeal allowed.

Solicitors: *Foo & Quek*; *Shook Lin & Bok*.

Reported by *Kevin Mathews*

Ong Kin Hong v Public Prosecutor

COURT OF CRIMINAL APPEAL (SINGAPORE) —CRIMINAL APPEAL NO 5 OF 1988
WEE CHONG JIN CJ, THEAN AND CHAN SEK KEONG JJ
30 JULY 1990

Evidence — Admissibility — 'Trial within a trial' — Whether findings can be imported into main trial where accused has elected to remain silent

The appellant was convicted by the High Court on the charge that between 10am and 12 noon on 24 December 1984 he committed murder by causing the death of Foo Jee Leng ('deceased'), a female aged 34. He appealed against his conviction. The appellant submitted that the trial judges erred by importing their finding during the trial within the trial that the appellant was a mendacious witness as the reason for rejecting the exculpatory parts of the appellant's statements and had also erred in taking into consideration the appellant's demeanour during the trial within a trial to assess his credibility and had thereby dismissed the defences based on the exculpatory parts of his statements.

Held, dismissing the appeal:

(1) It is to be observed that the appellant when called upon to enter on his defence elected to remain silent and the defence called no evidence. In those circumstances and having regard to those parts of the appellant's statements relied on as exculpatory, the trial judges rejected the submissions advanced by the appellant that it was open to the trial court to find that the appellant had established on a balance of probability the defences of grave and sudden provocation of self-defence or that the death was caused without premeditation in a sudden fight in the heat of passion upon a sudden quarrel without the appellant having taken undue advantage or acted in a cruel and unusual manner.

(2) The trial judges were entitled on all the evidence before the court to reject the defences which were based solely on the statements made by the appellants to Inspector Samadi.

Loh Lin Kok for the appellant.
Lee Sing Lit for the Public Prosecutor.

Cur Adv Vult

Wee Chong Jin CJ (delivering the judgment of the court): The appellant, Ong Kin Hong, was convicted by the High Court on the charge that between 10am and 12 noon on 24 December 1984 he committed murder by causing the death of Foo Jee Leng ('deceased'), a female aged 34. He appealed against his conviction. We dismissed his appeal and we now give our reasons.

The facts can be briefly summarized. At the material time the appellant was a member of the Singapore Footwear Merchants Association and the deceased was employed by it as a junior clerk. The body of the deceased was found by the association's senior clerk, Lau Yiok Tzong and Chaw Kim Meng, a member of the association.

She was found lying on the floor of a toilet of the association's premises at about noon on 24 December